

## Chapter 15

### Private International Law

#### A. COMMERCIAL LAW

##### 1. Carriage of Goods by Sea Convention

On September 23, 2009, Fay Hartog Levin, U.S. Ambassador to the Netherlands, signed the United Nations Convention on Contracts for the International Carriage of Goods, Wholly or Partly by Sea (“Rotterdam Rules”) on behalf of the United States. The UN General Assembly adopted the Rotterdam Rules, which were negotiated under the auspices of the UN Commission on International Trade Law (“UNCITRAL”), on December 11, 2008. U.N. Doc. A/RES/63/122. The signing ceremony took place in Rotterdam, the Netherlands, and Ambassador Levin made a signing statement expressing strong support for the treaty and explaining its significance. Ambassador Levin’s statement, excerpted below, is available at <http://thehague.usembassy.gov/news/events/events-2009/ambassador-hartog-levin-formally-signs-rotterdam-rules.html>. For additional background, see *Digest 2003* at 843–87; *Digest 2004* at 815–19; *Digest 2005* at 793–99; *Digest 2006* at 903–18; and *Digest 2008* at 743–45.

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... The United States strongly supports this treaty. It will bring about a much-needed modernization and harmonization of transport law. Existing national laws and international conventions make up a patchwork of inconsistent and sometimes conflicting rules with significant gaps that hinder the free flow of goods and increase costs.

The U.S. legal regime goes back to 1936 and for the most part simply enacts the 1924 Hague Rules. Even the most recent international convention on these maritime rules is a generation old. None of these could anticipate the changes that have swept through the industry, triggered by containerization and electronic commerce.

This is an exceptional occasion. Another chance to reform and update international transport law will not come anytime soon.

Before negotiations started six years ago, U.S. shipper and carrier interests established a set of common objectives for a new U.S. policy. They realized, however, that a new global regime would be preferable to a unilateral U.S. initiative.

These stakeholders, along with the U.S. Maritime Law Association, therefore agreed to defer seeking new U.S. legislation and to support U.S. Government participation in the UNCITRAL negotiations. During this negotiation, the United States worked closely with all of our industry stakeholders, including shippers, carriers, intermediaries, insurers, and inland carriers.

In fact, the negotiation saw unprecedented participation by governments, industry representatives and academics from all corners of the world. That was the key to the success of this

effort. This convention adopted by the UN General Assembly represents a carefully crafted package that balances a wide span of interests.

The successful conclusion of this Convention required everyone, including the United States, to compromise. We strongly believe that Convention as a whole represents a substantial step forward.

It will govern the entire contractual period of carriage, which often includes inland transportation as well as a sea voyage. It clarifies the burdens of proof for all parties and the defenses of a carrier. It lets the shipper/plaintiff choose the place of litigation.

It lets the commercial partners negotiate a transport contract that best meets their needs while providing safeguards for those who want them. This contractual freedom is of particular importance to the United States. The provisions on contractual freedom reflect the way business is done today and correspond to practice in other areas of commercial law.

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## 2. UNCITRAL

### *a. Review of work*

On October 12, 2009, Mary McLeod, Legal Adviser, U.S. Mission to the United Nations, addressed the UN General Assembly's Sixth (Legal) Committee during its annual debate on the report of the UN Commission on International Trade Law ("UNCITRAL"). Excerpts from Ms. McLeod's statement follow, expressing strong support for UNCITRAL's work. The full text of Ms. McLeod's statement is available at <http://usun.state.gov/briefing/statements/2009/130522.htm>.

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We . . . note the completion of the UNCITRAL practice guide for cross-border "protocols" to coordinate and achieve cooperation between bankruptcy authorities and courts in various countries, on matters involving cross-border business bankruptcy cases. In view of the heightened importance of achieving international cooperation in such matters, given the economic circumstances of the past year, the timing of this achievement is particularly welcome. The guide supports implementation of the 1997 UNCITRAL Model Law on cross-border insolvency cases, which Congress enacted as part of the U.S. Bankruptcy Code effective in 2006.

The United States supports the continuing work of the Commission in its Working Groups on international procurement, commercial arbitration, secured finance and intellectual property law, and business insolvency law and looks forward to conclusion of the work of several working groups at the next Plenary Session of the Commission in 2010. We also support consideration of new work on electronic commerce, including work on "single window" projects (structured channels for electronic facilitation of import-export trade) in conjunction with the World Customs Organization (WCO), the UN Economic Commission for Europe (UNECE), the Association of Southeast Asian Nations (ASEAN), the UN Conference on Trade and Development (UNCTAD) and others, and work on on-line electronic dispute resolution.

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At the request of developing country member states, the UN Legal Office's Trade Law Branch is exploring the feasibility of posting Secretariat professional staff, possibly on a part time basis, to collaborate with other UN bodies, and other means to better accomplish requests for technical assistance. As stated at the Plenary session, enhancing Technical Assistance, if done within existing resources, is a positive step that benefits developing countries.

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### ***b. Working methods***

In her statement during the Sixth Committee's annual debate on UNCITRAL's report, discussed in A.2.a. *supra*, Ms. McLeod stressed the need to maintain UNCITRAL's existing working methods. Ms. McLeod stated:

The United States has joined like-minded states at the Commission in rejecting proposals over the last two years to revise rules and procedures for the Commission's work which would have the effect of sharply reducing the effectiveness of the Commission. Key issues have included the role of observer states whose views are considered in all matters except for formal voting, and technical NGOs [nongovernmental organizations], which the United States and like-minded states have supported in their role of providing needed advice and information on transactional practices and economic impacts of proposals, as the basis on which governments have assurance that solutions proposed actually work in current transactional practice. Another key issue has been the method of reaching agreement. Since 1970, the Commission has proceeded on the basis of a substantial prevailing majority, rather than full unanimity, since getting unanimous agreement on detailed commercial law texts is unworkable, subject always to the right of any member state to obtain a vote on any matter. Shifting to a unanimity standard (absence of objection) would substantially curtail the Commission's five-decade production of detailed commercial law treaties, model laws and other texts.

The full text of Ms. McLeod's statement is available at <http://usun.state.gov/briefing/statements/2009/130522.htm>.

### **3. OAS Model Secured Transaction Registry Regulations**

In October 2009 the Seventh Inter-American Specialized Conference on Private International Law of the Organization of American States (“CIDIP VII”) adopted the OAS Model Secured Transaction Registry Regulations (“Model Registry Regulations”), along with an accompanying commentary. U.S. officials and experts served with counterparts from Argentina, Canada, and Mexico on a special drafting committee that prepared the initial draft regulations. The drafting of the Model Registry Regulations occurred as a follow-up project to the OAS’s adoption of the Model Inter-American Law on Secured Transactions (“Model Law”) in 2002, and the Model Registry Regulations provide a transparent, accessible, and inexpensive framework for implementing the Model Law.

The Model Registry Regulations provide the legal structure needed for states to create a properly functioning Registry of Movable Property Security Interests, as Title IV of the Model Law provides. The Model Registry Regulations are applicable in states following either the civil or common law traditions. The regulations also provide guidance for using online technology to create an electronic registry that a small staff can operate inexpensively and that can eliminate the access problems associated with a physical registry.

The local enactment of the Model Inter-American Law and Registry Regulations by states within the Americas has the potential to reduce significantly the cost of borrowing and facilitate international trade. If enacted at the local level, the Model Law and Model Regulations would enable a much broader segment of society, including small and medium-sized businesses, to participate in the secured lending market, since the law and regulations would expand the types of property that can be used as collateral beyond real estate, buildings, and automobiles. Some experts estimate that the Model Law and Model Registry Regulations, if fully implemented, could increase Latin American countries’ economies by 8–10 percent within a decade.

### **4. Geneva Securities Convention**

On October 5–9, 2009, the Convention on Substantive Rules for Transfers of Intermediated Securities (“Geneva Securities Convention” or “Convention”) was concluded by consensus at a diplomatic conference in Geneva, Switzerland. The United States, together with more than 50 states and 15 international organizations and industry-focused nongovernmental organizations (“NGOs”) participated actively in the conference, consistent with practice in international private law bodies. Once it enters into force or is applied broadly, the Convention is expected to establish the first negotiated international baseline for modern domestic and cross-border transfers of and accounts for investment securities, as well as related securities market practices. The

United States participated actively in negotiating the treaty, and the final text of the Convention reflected most U.S. objectives. The United States is one of a minority of countries that have modernized their legal frameworks for electronic securities holding, transfer, and collateralization, and the Convention's conclusion is consistent with U.S. efforts to promote development of enhanced international standards concerning securities transactions. This Convention follows the negotiation of the first treaty on investment security law, the 2006 Hague Convention on Law Applicable to Intermediated Securities, which the United States signed in 2006. Together these treaties form the first effort to create a multilateral law for the securities sector.

The new Geneva Securities Convention is designed to create an international legal framework for securities holding, transfer, clearance, settlement, and collateralization. The Convention is the first multilateral effort to address gaps among most states' securities laws governing transactions, which are inadequate for many contemporary securities markets, in which "intermediates" handle securities in electronic form. While a growing number of countries are adopting versions of electronic intermediated systems, the legal framework that underlies this modern system in many countries still relies on traditional legal concepts developed for tangible assets, i.e., paper certificates recorded on company books or held in physical custody. As a result, the legal risk in the area of securities holding and disposition is particularly high. The growing interrelationship of capital markets as more securities are transferred electronically across borders, coupled with the frequent incompatibility of domestic legal frameworks, further heightens legal uncertainty. The Convention seeks to harmonize the international legal framework for intermediated securities by addressing the rights resulting from the credit of securities and other transfers to a securities account; clearance and settlement systems and the effect of systemic rules; the holding of securities by and the obligations of intermediaries; irrevocability and protection of securities transactions; priority ranking among competing interests; investor protection; loss allocation in cases of shortfall; related insolvency issues; and use and disposition of securities in collateral transactions, including basic rules for financial netting.

To help achieve compatible results for cross-border transactions among ratifying states, the Convention also addresses aspects of market systems that do not rely on electronic intermediation. For example, the Convention allows a number of declarations by which ratifying states can adjust the treaty's provisions to reflect the structure of their particular markets. In this manner, the Convention can be applied to intermediated systems like the United States', as well as to countries with more traditional markets.

Participants in the diplomatic conference agreed that the Convention's text would become authentic within 120 days after the conference, following the UNIDROIT Secretariat's technical review of the official English and French versions of the treaty to ensure conformity. Preparation of an Official

Commentary to the Convention, a necessary step to ensure that states implement the treaty consistently, remained underway at the end of 2009. Once both steps occur, the United States will determine whether signing the Convention is appropriate. The text of the Convention and additional background are available at [www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm](http://www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm).

## **5. Choice of Courts Convention**

On January 19, 2009, then State Department Legal Adviser John B. Bellinger, III, signed the 2005 Hague Convention on Choice of Court Agreements (“Choice of Court Convention”) on behalf of the United States in The Hague. The United States was the first country to sign the Choice of Court Convention, and Mexico had acceded to it previously. The Choice of Court Convention obligates states parties to enforce exclusive choice of court agreements in civil or commercial matters and to recognize and enforce the resulting judgments. For additional background, see the press statement issued by the Hague Conference on Private International Law on January 19, 2009, available at [www.hcch.net/index\\_en.php?act=events.details&year=2009&varevent=157](http://www.hcch.net/index_en.php?act=events.details&year=2009&varevent=157). The full text of the Choice of Court Convention is available at [www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98).

## **B. FAMILY LAW**

### **Convention on International Recovery of Child Support and Other Forms of Family Maintenance**

On October 6, 2009, Keith Loken, Assistant Legal Adviser for Private International Law, Department of State, and one other executive branch official testified before the Senate Committee on Foreign Relations in support of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. President George W. Bush transmitted the treaty to the Senate for its advice and consent to ratification on September 8, 2008. S. Treaty Doc. No. 110–21 (2008). Mr. Loken’s testimony, excerpted below, is available at <http://foreign.senate.gov/imo/media/doc/LokenTestimony091006p1.pdf>. See also the testimony of Vicki Turetsky, Commissioner, Office of Child Support Enforcement, Department of Health and Human Services, available at <http://foreign.senate.gov/imo/media/doc/TuretskyTestimony091006p1.pdf>, and *Digest 2008* at 751–58 and other annual volumes beginning in 2001.

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. . . The Convention was negotiated over a period of several years in the Hague Conference on Private International Law, the source also of the Hague Child Abduction and Child Adoption Conventions to which the United States is a party. The views of concerned domestic stakeholders were taken into account. . . . As a result, there is broad support for the Convention among public officials and private parties who are involved in the enforcement of child support orders in the United States.

Why is this Convention needed? In an era of globalization and increased international movement of individuals, it is increasingly common to find the custodial parent and child in one country and the non-custodial parent in another. There are currently an estimated 150,000 international child support cases in the United States. We have learned that it is difficult, if not impossible, to enforce legal obligations abroad relating to child support without a treaty basis. There are existing multilateral child support conventions that date back a number of years (the most recent is more than 35 years old), but the United States is not a party to them for various reasons, for example, because the jurisdictional provisions were not consistent with U.S. law, or because we considered them ineffective in that they did not require parties to establish new child support orders or to provide cost-free services. The new Convention remedies these deficiencies.

Why is this Convention good for the United States? A major benefit is reciprocity. Although U.S. courts routinely, on the basis of comity or otherwise, recognize and enforce foreign child support orders, the same is typically not true of foreign courts. Many foreign countries will not process foreign child support requests in the absence of a treaty obligation. The United States has entered into bilateral agreements and arrangements with several countries. These instruments will remain in effect. This Convention expands upon the provisions of such instruments and includes several procedural improvements that should simplify the process of implementing child support decisions across borders. Under this Convention, more U.S. children would be able to obtain the financial support they need from a non-custodial parent located overseas. The United States obtained its key objectives in the negotiation of the Convention:

- Scope of the Convention: The Convention addresses maintenance obligations arising from a parent-child relationship and spousal support in a manner that is consistent with existing mechanisms under federal and state law in the United States.
- Jurisdiction: Jurisdictional rules in the United States differ from those in most other countries. The Convention sets forth various mandatory bases for assertion of jurisdiction over the debtor parent, but permits parties to take a reservation with respect to creditor-based jurisdiction, jurisdiction based on a written agreement, or jurisdiction based on a matter of personal status or parental responsibility. The Executive Branch recommends that, should the United States ratify the Convention, it take such a reservation, as this would be consistent with applicable U.S. jurisprudence.
- Establishment: The Convention not only addresses the recognition and enforcement of foreign child support orders, but also the establishment of a new child support decision in the requested State where that is necessary, for example, where the requested State does not recognize the jurisdictional basis of a child support order issued in the requesting State. This obligation to establish a new decision includes an obligation to establish paternity, where necessary.
- Costs: While the Convention provides a mechanism available to foreign applicants who want to approach directly the relevant court or other authority, we anticipate that a majority of the requests will occur via the Central Authorities. Because applicants who

rely on government child support enforcement mechanisms generally have limited financial resources, it was vital to U.S. negotiators that the Convention require that assistance in cases processed through Central Authorities generally be provided free of charge.

How will this Convention be implemented in the United States? The Convention would be implemented through a combination of amendments to part D of title IV of the Social Security Act and adoption by the states of amendments, already approved by the Uniform Law Commission, to the relevant uniform state law, the Uniform Interstate Family Support Act (UIFSA). It is proposed that HHS would be the Central Authority under the Convention. Since 1975, HHS has operated a Federal Parent Locator Service that will facilitate locating non-custodial parents and referring foreign cases to the appropriate state agency to provide services. Also, since 1996, HHS has acted as the Central Authority under bilateral agreements and arrangements with other countries on child support enforcement. It has the expertise, established administrative processes, and close relations with child support enforcement officials in all of the states. The State Department and HHS have cooperated effectively for many years on international child support matters.

Will other countries join the Convention? We expect so. The member states of the European Community (EC) strongly support the Convention. The European Commission has tabled with the European Council a draft proposal to ratify the Convention. . . . Canada also is a strong supporter of the Convention and we understand that the federal government there is working with the provinces and territories on implementation under Canada's federal system. We understand that other countries such as Norway and Australia are actively considering joining. The international community is waiting to see what the United States does; U.S. ratification would send a strong signal to others. . . .

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## **C. INTERNATIONAL CIVIL LITIGATION**

### **1. Concurrent and Related Proceedings in Foreign Courts**

On November 17, 2009, the U.S. Court of Appeals for the Ninth Circuit issued an amended opinion, reversing and remanding a district court's decision to deny an application for an antisuit injunction. *Applied Med. Distrib. Corp. v. Surgical Co. BV*, 587 F.3d 909 (9th Cir. 2009). According to the Ninth Circuit, the litigation arose after a California corporation, Applied Medical Distribution Corp. ("Applied"), decided not to renew its distribution agreement with a Netherlands limited liability company, Surgical Company BV ("Surgical"). The agreement contained clauses providing for dispute resolution exclusively in California courts under California law, as well as a provision limiting the parties' liability in case of termination. After Surgical claimed an entitlement to compensation under Belgian law, Applied filed a summary judgment motion in federal court in California requesting that the court issue an antisuit injunction applicable outside California, including in Belgium. Applied also sought a declaration that the distribution agreement had terminated under its terms,



that the agreement did not permit “goodwill indemnities,” and that Surgical would receive nothing as a result of the agreement’s termination. Finally, Applied sought attorneys’ fees, expenses, and costs. Surgical then filed suit against Applied in Belgium.

The Ninth Circuit based its conclusion that the district court had abused its discretion in denying the antisuit injunction on two grounds. The court stated:

First, the district court applied the wrong legal standard by requiring that the claims in the domestic and foreign action be “identical” instead of engaging in the more functional inquiry concerning dispositiveness required by [*E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006)]. Second, the district court relied on the clearly erroneous factual determination that Surgical’s Belgian claims, other than goodwill indemnities, were available apart from termination. Because all of Surgical’s claims, like goodwill indemnities, as a practical matter depend on termination of the Agreement, they all “aris[e] out of th[e] Agreement” and are subject to the forum selection clause.

*Applied Med. Distrib. Corp.*, 587 F.3d at 914. Applying the test set out in *Gallo* for granting an antisuit injunction, the court concluded that “the claims in the two actions are functionally the same and the first action is dispositive of the action to be enjoined in the sense that all of the Belgian claims fall under the contract’s forum selection clause and can be litigated and resolved in the California action.” *Id.* The court also “recognize[d] California’s strong policy in favor of enforcing forum selection clauses and note[d] the comity concerns that would arise if a party to a contract containing a forum selection clause were permitted to proceed with duplicative litigation challenging the rightful authority of the contractually-designated forum court.” *Id.*

## **2. Recognition and Enforcement of Foreign Judgments and Arbitral Awards**

### **a. Foreign arbitral award: *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic***

On September 28, 2009, the U.S. Court of Appeals for the Second Circuit vacated and remanded to the district court a case in which a company based in the Cayman Islands, Frontera Azerbaijan Oil Corporation (“Frontera”), sought to confirm a Swedish arbitral award against the State Oil Company of the Azerbaijan Republic (“SOCAR”), which is based in Azerbaijan and owned by the Azerbaijan government. *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009). Frontera based its

action on Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), 21 U.S.T. 2517, 330 U.N.T.S. 38, which the United States implements through 9 U.S.C. § 207. On the main issue presented, the court held that the district court correctly held that it needed personal or quasi in rem jurisdiction over SOCAR or its property to confirm the Swedish arbitral award, but incorrectly held that foreign states and their agents have due process rights under the U.S. Constitution. “SOCAR is not entitled to the Due Process Clause’s jurisdictional protections if it is an agent of the Azerbaijani state,” the court stated. *Id.* at 394–95. The court also overruled its contrary holding in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981). In remanding the case, the court instructed the district court to determine “(1) whether SOCAR is an agent of Azerbaijan, and if not, (2) whether SOCAR is entitled to the protections of the Due Process Clause.” *Frontera Resources Azerbaijan Corp.*, 582 F.3d at 401. Excerpts follow from the court’s analysis of the jurisdictional questions the case raised (footnotes omitted).

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We have previously avoided deciding whether personal or quasi in rem jurisdiction is required to confirm foreign arbitral awards pursuant to the New York Convention. *See Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202, 207 (2d Cir. 2003). However, the numerous other courts to have addressed the issue have each required personal or quasi in rem jurisdiction. *See, e.g., Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178–79 (3d Cir. 2006); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120–22 (9th Cir. 2002); *Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory”*, 283 F.3d 208, 212–13 (4th Cir. 2002); *see also Transatl. Bulk Shipping Ltd. v. Saudi Chartering S.A.*, 622 F. Supp. 25, 27 (S.D.N.Y. 1985).

Frontera contends that none of these courts addressed the precise argument it advances here: that there is no “positive statutory or treaty basis” for such a jurisdictional requirement. The federal statute that implements the New York Convention requires a court to confirm an award “unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.” 9 U.S.C. § 207. Article V of the New York Convention “provides the exclusive grounds for refusing confirmation,” *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15, 20 (2d Cir. 1997), and specifies seven grounds for refusing to enforce an arbitral award, none of which include a lack of jurisdiction over the respondent or the respondent’s property, *see* New York Convention at art. 5, 21 U.S.T. at 2517. Frontera accordingly argues that we cannot impose a jurisdictional requirement if the Convention does not already have one. We disagree.

Unlike “state courts[,] [which] are courts of general jurisdiction[,] . . . federal courts are courts of limited jurisdiction which thus require a specific grant of jurisdiction.” *Foxhall Realty Law Offices, Inc. v. Telecomm. Premium Servs., Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998) (citing *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850)). “The validity of an order of a federal court depends upon that court’s having jurisdiction over both the subject matter and the parties.” *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). While the requirement of subject matter jurisdiction “functions as a restriction on federal power,” *id.* at 702, the need for personal jurisdiction is fundamental to “the court’s power to exercise control over the parties,” *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). “Some basis must be shown, whether arising from the respondent’s

residence, his conduct, his consent, the location of his property or otherwise, to justify his being subject to the court's power." *Glencore Grain*, 284 F.3d at 1122 (quoting *Transatl. Bulk Shipping*, 622 F. Supp. at 27).

Because of the primacy of jurisdiction, "jurisdictional questions ordinarily must precede merits determinations in dispositional order." *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). "[T]he items listed in Article V as the exclusive defenses . . . pertain to substantive matters rather than to procedure." *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 496 (2d Cir. 2002) (emphasis added). Article V's exclusivity limits the ways in which one can challenge a request for confirmation, but it does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought. . . .

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## **B. SOCAR's Rights Under the Due Process Clause**

The district court recognized that our precedent *Texas Trading* compelled it to hold that SOCAR possessed rights under the Due Process Clause, thus requiring that jurisdiction over SOCAR meet the minimum contacts requirements of *International Shoe* [*v. Washington*, 326 U.S. 310 (1945)]. The district court, however, questioned *Texas Trading*'s soundness. These doubts were well-founded.

The Due Process Clause famously states that "no *person* shall be . . . deprived of life, liberty or property without due process of law." U.S. Const. amend. V (emphasis added). In *Texas Trading*, we held that a foreign state was a "person" within the meaning of the Due Process Clause, and that a court asserting personal jurisdiction over a foreign state must—in addition to complying with the FSIA [Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611]—therefore engage in "a due process scrutiny of the court's power to exercise its authority" over the state. 647 F.2d at 308, 313 ("[T]he [FSIA] cannot create personal jurisdiction where the Constitution forbids it."). *Texas Trading* reached this conclusion without much analysis, while also noting that cases on point were "rare." *Id.* at 313.

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Since *Texas Trading*, however, the case law has marched in a different direction. In *Republic of Argentina v. Weltover, Inc.*, the Supreme Court "assum[ed], without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause," 504 U.S. 607, 619 (1992), but then cited *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966), which held that "States of the Union are not 'persons' for purposes of the Due Process Clause," 504 U.S. at 619. *Weltover* did not require deciding the issue because Argentina's contacts satisfied the due process requirements, *see id.* at 619 & n.2, but the Court's implication was plain: If the "States of the Union" have no rights under the Due Process Clause, why should foreign states?

After *Weltover*, we noted that "we are uncertain whether [*Texas Trading*] remains good law." *Hanil Bank v. PT Bank Negara Indon.*, 148 F.3d 127, 134 (2d Cir. 1998). But we went no further in *Hanil Bank* because the due process requirements were satisfied in that case. *See id.* The instant case is different, however, as only the Due Process Clause prevented the district court from asserting personal jurisdiction over SOCAR.

In *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), the D.C. Circuit reasoned that because "the word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union," *Katzenbach*, 383 U.S. at 323, "absent some compelling reason to treat foreign sovereigns more favorably than 'States of the Union,' it would make no sense to view foreign states as 'persons'

under the Due Process Clause,” 294 F.3d at 96. The *Price* court found no such reason, *see id.* at 95–100, and we find that case’s analysis persuasive. . . .

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For the reasons discussed by the *Price* court in its thorough opinion, we “are unwilling to interpret the Due Process Clause as conferring rights on foreign nations that States of the Union do not possess.” *Id.* at 99. Thus, we hold that the district court erred, albeit understandably in light of *Texas Trading*, by holding that foreign states and their instrumentalities are entitled to the jurisdictional protections of the Due Process Clause.

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Simply overruling *Texas Trading*, however, and holding that a sovereign state does not enjoy due process protections does not decide the precise question in this case, because SOCAR is not a sovereign state, but rather an instrumentality or agency of one. . . .

. . . [I]f the Azerbaijani government “exerted sufficient control over” SOCAR “to make it an agent of the State, then there is no reason to extend to [SOCAR] a constitutional right that is denied to the sovereign itself.” *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 301 (D.C. Cir. 2005). Although “government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such,” this presumption can be overcome if the state so “extensively control[s]” the instrumentality “that a relationship of principal and agent is created,” or if “adher[ing] blindly to the corporate form . . . would cause . . . injustice.” *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba* (“*Bancec*”), 462 U.S. 611, 626–27, 629, 632 (1983) . . . . Although *Bancec* asked when a state instrumentality can be treated like its state for “the attribution of liability,” *id.* at 622 n.11, we think, as the D.C. Circuit did in *TMR Energy*, that *Bancec*’s analytic framework is also applicable when the question is whether the instrumentality should have due process rights to which the state is not entitled. *See TMR Energy*, 411 F.3d at 301 . . . . Accordingly, if SOCAR is an agent of the Azerbaijani state, as recognized in *Bancec* and subsequent cases, then, like Azerbaijan, SOCAR lacks due process rights.

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***b. Comity in litigation under the Hague Abduction Convention: Asvesta v. Petroutsas***

On August 29, 2009, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded a district court decision granting a mother’s petition under the Hague Convention on the Civil Aspects of International Child Abduction (“Hague Convention”). *Asvesta v. Petroutsas*, 580 F.3d 1000 (9th Cir. 2009). The Ninth Circuit held that the district court erred in granting comity to a previous Greek court order denying a Hague Convention petition the father brought against the mother. The Ninth Circuit concluded that the Greek court’s analysis “misapplie[d] the provisions of the Convention, relie[d] on unreasonable factual findings, and contradict[ed] the principles and objectives of the Hague Convention,” and the Ninth Circuit directed the district court to carry out its own analysis under the Hague Convention.

According to the Ninth Circuit, the factual background to the case involved two separate incidents of alleged abduction. The first, which was the subject of the Greek proceeding, arose after the mother, a Greek national, traveled to Greece with the couple's child and informed the father, a U.S.–Greek national, that she would not return to the United States with the child. After petitioning for divorce and receiving temporary custody from a California court, the father filed a petition seeking the child's return under the Hague Convention. A Greek court dismissed the father's petition and later a different Greek court awarded custody to the mother and supervised visitation for the father. Subsequently, the California court modified its earlier custody order, granted the father temporary sole custody, and ordered the parties to mediate the dispute in Greece.

Excerpts follow from the Ninth Circuit's discussion in concluding that a court may examine a foreign court's analysis of a Hague Convention petition before deciding to rely on the foreign judgment based on comity.\* For discussion of the brief the United States filed in 2009 in another case, concerning whether a *ne exeat* clause confers a right of custody under the Hague Convention, see Chapter 2.B.2.a.

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#### **A. International Comity and the Hague Convention**

The district court granted Asvesta's Hague petition and ordered the child returned to Greece after extending "comity" to the Greek court's 2006 Hague Convention decision. "The extent to which the United States, or any state, honors the judicial decrees of foreign nations is a matter of choice, governed by 'the comity of nations.'" *Wilson v. Marchington*, 127 F.3d 805, 808 (9th Cir. 1997) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163 (1895)). "Comity is 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.'" *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1067 (9th Cir. 2007) (quoting *Hilton*, 159 U.S. at 164). Extension of comity to a foreign judgment is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Id.* (internal quotation omitted).

As this court recognized in *Marchington*, "*Hilton* [v. *Guyot*] provides the guiding principles of comity[:]"

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be

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\* Editor's note: On April 16, 2010, the U.S. District Court for the Northern District of California decided that the child's habitual residence was the United States and therefore ordered the mother to return the child from Greece. *Asvesta v. Petroutsas*, 2010 U.S. Dist. LEXIS 47872 (N.D. Cal. 2010).

tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

*Hilton*, 159 U.S. at 202–03; *see also Marchington*, 127 F.3d at 810 & n.4.

The few United States courts that have addressed the extension of comity to Hague Convention orders of foreign courts “have observed that comity ‘is at the heart of the Hague Convention.’” *Diorinou* [*v. Mezitis*], 237 F.3d [133,] 142 [2d Cir. (2001)] (quoting *Blondin v. Dubois*, 189 F.3d 240, 248 (2d Cir. 1999)). The Second Circuit has noted that, where comity is at issue, a court properly begins its analysis “with an inclination to accord deference to” a foreign court’s adjudication of a related Hague petition. *Diorinou*, 237 F.3d at 145. We agree.

Such an approach is consistent with the Convention drafters’ primary concern “with securing international cooperation regarding the return of children wrongfully taken by a parent from one country to another.” *Gonzalez v. Gutierrez*, 311 F.3d [942,] 944 [(9th Cir. 2002)]. *Diorinou*’s approach is also consistent with the relatively narrow grounds, set forth in *Hilton*, upon which courts may rely in withholding comity.

We recognize that *Hilton* cautions that “[t]he merits of [a foreign judgment] should not, in an action brought in this country upon the judgment, be tried afresh.” 159 U.S. at 202–03. However, the two federal courts of appeal that have considered whether to extend comity to foreign Hague Convention judgments—the Second Circuit in *Diorinou* and the Third Circuit in *Carrascosa v. McGuire*, 520 F.3d 249 (3d Cir. 2008)—both looked closely at the merits of the foreign court’s decision in determining whether comity could properly be extended to its judgment.

\* \* \* \*

We agree that, in the context of the Hague Convention, a court’s decision to extend comity to a foreign judgment may be guided by a more searching inquiry into the propriety of the foreign court’s application of the Convention, in addition to the considerations of due process and fairness outlined specifically in *Hilton*. Generally, the issue of comity arises when a foreign court has entered a judgment after applying its own substantive and procedural laws, *see, e.g., Hilton*, 159 U.S. at 114–20; in these cases, *Hilton*’s admonition to avoid a reexamination of the merits of a foreign court’s judgment seems most relevant. Here, however, we consider whether the district court properly extended comity to a foreign court that applied the Hague Convention—a legal framework agreed upon and implemented by all contracting nations. In this context, we are in a better position to examine the merits of a foreign court’s Hague decision in deciding whether that decision warrants deference. Although we recognize that our careful examination of the merits of another contracting nation’s Hague adjudication could, in some circumstances, undermine the mutual trust necessary for the Convention’s continued success, we also recognize that its success relies upon the faithful application of its provisions by American courts and the courts of other contracting nations. For this reason, we follow the path charted by *Diorinou*, *Carrascosa*, and *Pitts* [*v. De Silva*, 2008 ON.C. LEXIS 34 (Jan. 10, 2008)], and conclude that we may properly decline to extend comity to the Greek court’s determination if it clearly misinterprets the Hague Convention, contravenes the Convention’s fundamental premises or objectives, or fails to meet a minimum standard of reasonableness.

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### 3. Enforceability of Arbitration Clauses

#### a. *Safety Nat'l Casualty Corp. v. Certain Underwriters at Lloyd's London*

On November 9, 2009, the U.S. Court of Appeals for the Fifth Circuit, sitting en banc, vacated on interlocutory appeal a lower court's denial of a motion to compel arbitration in a contractual dispute among three insurers. *Safety Nat'l Casualty Corp. v. Certain Underwriters at Lloyd's London*, 587 F.3d 714 (5th Cir. 2009). On February 11, 2009, the Fifth Circuit granted rehearing en banc and vacated the 2008 decision of a panel of the Fifth Circuit. For prior developments in the case, see *Digest 2008* at 777-82.

The en banc panel concluded that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, does not permit Louisiana state law to preempt the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention"). The court referred to preemption by Louisiana state law as "reverse preemption." Under the McCarran-Ferguson Act, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Excerpts below from the Fifth Circuit's opinion provide its analysis in concluding that "[b]ecause here the Convention, an implemented treaty, rather than the Convention Act [9 U.S.C. §§ 201-208], supersedes state law, the McCarran-Ferguson Act's provision that 'no Act of Congress' shall be construed to supersede state law regulating the business of insurance is inapplicable." *Id.* at 725. (Footnotes, including case citations, are omitted).\*

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... [T]he texts of the Convention, the Convention Act, and the McCarran-Ferguson Act support the conclusion that the McCarran-Ferguson Act does not authorize Louisiana to reverse-preempt the Convention by means of contrary legislation prohibiting arbitration of disputes regarding contracts of insurance.

... Although it is not clear from [the Louisiana statute's] text that arbitration agreements are voided, Louisiana courts have held that [arbitration] agreements are unenforceable because of this statute.

The Louisiana statute, as so interpreted, conflicts with the United States's commitments under the Convention. The Convention states that each signatory nation "shall recognize an agreement in

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\* Editor's note: On February 5, 2010, Louisiana Safety Association of Self Insurers' Fund ("LSAT") filed a petition for certiorari in the U.S. Supreme Court, arguing that the Fifth Circuit's opinion conflicted with the decision of the U.S. Court of Appeals for the Second Circuit in *Stephens v. American Int'l Insurance Co.*, 66 F.3d 41 (2d Cir. 1995), which remained pending as of June 2010. On August 26, 2010, in response to the invitation of the Court, the United States filed an *amicus curiae* brief with the Court, which is available at [www.justice.gov/osg/briefs/2010/2pet/6invit/2009-0945.pet.ami.inv.pdf](http://www.justice.gov/osg/briefs/2010/2pet/6invit/2009-0945.pet.ami.inv.pdf). The U.S. brief also made clear it views relevant provisions of the New York Convention as self-executing.

writing under which the parties undertake to submit to arbitration” their dispute “concerning a subject matter capable of settlement by arbitration.” The Convention contemplates enforcement in a signatory nation’s courts, directing that courts “shall” compel arbitration when requested by a party to an international arbitration agreement, subject to certain exceptions not at issue in the present case:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

This treaty is the subject of the Convention Act. That Act states that the Convention “shall be enforced in United States courts in accordance with this chapter.” The Act additionally provides relevant definitions and establishes federal court jurisdiction and venue. The parties agree that requiring arbitration of the present dispute in compliance with the Convention would contravene the Louisiana statute.

. . . The McCarran–Ferguson Act . . . allows state law to reverse-preempt an otherwise applicable federal statute because the McCarran–Ferguson Act does not permit an “Act of Congress” to be “construed to invalidate, impair, or supersede” state law unless the Act of Congress “specifically relates to the business of insurance.”

For the purposes of the McCarran–Ferguson Act, neither the Convention nor the Convention Act specifically relates to the business of insurance. . . [W]e will assume, without deciding, that the Louisiana statute regulates the business of insurance, although the matter is not entirely free from doubt. We, therefore, limit our analysis to whether Louisiana law overrides the Convention’s requirement that the present dispute be submitted to arbitration because we construe an act of Congress to invalidate, impair, or supersede state law.

### III

LSAT contends that the Convention was not self-executing and could only have effect in the courts of this country when Congress passed enabling legislation. Accordingly, LSAT argues that the Convention’s enabling legislation is an “Act of Congress” within the meaning of the McCarran–Ferguson Act’s provision that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . .” LSAT reasons that the Convention has no effect independent of legislation enabling it and that the McCarran–Ferguson Act requires us to construe the Convention’s enabling legislation as reverse preempted by the Louisiana statute. . . .

\* \* \* \*

It is unclear to us whether the Convention is self-executing. . . .

\* \* \* \*

Even if the Convention required legislation to implement some or all of its provisions in United States courts, that does not mean that Congress intended an “Act of Congress,” as that phrase is used in the McCarran–Ferguson Act, to encompass a non-self-executing treaty that has been implemented by congressional legislation. Implementing legislation that does not conflict with or override a treaty does not replace or displace that treaty. A treaty remains an international agreement or contract negotiated



by the Executive Branch and ratified by the Senate, not by Congress.\* The fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an “Act of Congress.”

To accept LSAT’s argument, we must conclude that when Congress used “Act of Congress” in the McCarran–Ferguson Act, it intended that phrase to exclude self-executing treaty provisions but to include treaty provisions that are implemented by federal legislation. This is untenable. The commonly understood meaning of an “Act of Congress” does not include a “treaty,” even if the treaty required implementing legislation. . . . LSAT concedes that if the provisions in the Convention directing courts to enforce international arbitration agreements were self-executing, then the McCarran–Ferguson Act would have no preemptive effect because self-executing treaties are not an “Act of Congress.” Yet, there is no apparent reason—and LSAT has provided no rationale—why Congress would have chosen to distinguish in the McCarran–Ferguson Act between treaty provisions that are self-executing and those that are not self-executing but have been implemented. We do not consider it reasonable to construe the term “Act of Congress” in the McCarran–Ferguson Act as an indication of congressional intent to permit state law to preempt implemented, non-self-executing treaty provisions but not to preempt self-executing treaty provisions.

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\* Editor’s note: Pursuant to Article II, § 2 of the U.S. Constitution, the New York Convention was ratified by the President with the advice and consent of the Senate, not by the Senate. Article II § 2 provides: “[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .”

Our conclusion that Congress did not intend the term “Act of Congress,” as used in the McCarran–Ferguson Act, to reach a treaty such as the Convention is buttressed by the terms of the Convention Act. When Congress amended the FAA [Editor’s note: Federal Arbitration Act, 9 U.S.C. et seq.] in 1970 to include provisions that dealt with the Convention, it provided in 9 U.S.C. § 203, that “[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States.” This is a direct indication that Congress thought that for jurisdictional purposes, an action falling under the Convention arose not only under the laws of the United States but also under *treaties* of the United States. Accordingly, even in the very act of Congress that was arguably necessary to implement the Convention in domestic courts, Congress recognized that jurisdiction over actions to enforce rights under the Convention did not arise solely under an “Act of Congress.”

Equally important in the present case, it is a treaty (the Convention), not an act of Congress (the Convention Act), that we construe to supersede Louisiana law. The Convention Act states that the Convention “shall be enforced in United States courts in accordance with this chapter.” The Convention Act defines when an arbitration agreement “falls under the Convention”—principally when it is “commercial” and does not “aris[e] out of . . . a [legal] relationship which is entirely between citizens of the United States . . . unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.” The Convention Act provides United States courts with jurisdiction over “[a]n action or proceeding falling under the Convention . . . regardless of the amount in controversy.” But the Convention Act does not in this case operate without reference to the contents of the Convention. It is *the Convention* under which legal agreements “fall”; it is an action or proceeding under *the Convention* that provides the court with jurisdiction; such an action or proceeding is “deemed to arise under the laws *and treaties*” of the United States, the treaty in this case being the Convention; and when chapter 1 of title 9 (the FAA) conflicts with the Convention, *the Convention* applies.

The Convention Act directs us to the treaty it implemented, and when we “construe” the Convention, we are faced with the possibility of “superseding” the Louisiana law. The Convention requires that each signatory nation “shall recognize an agreement in writing under which the parties undertake to submit to arbitration” their dispute “concerning a subject matter capable of settlement by arbitration,” and provides for direct enforcement in a signatory nation’s courts, which “when seized of [a covered] action . . . shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null or void, inoperative or incapable of being performed.” The Convention itself contains defenses to the enforceability of an arbitration agreement by requiring that it is “in writing,” regulates a “subject matter capable of settlement by arbitration,” and is not “null and void, inoperative or incapable of being performed.” Accordingly, it is by reference to the Convention that we have a command—a judicially enforceable remedy—that we “supersede” Louisiana law unless there are defenses set forth in the Convention that counteract that command. Because here the Convention, an implemented treaty, rather than the Convention Act, supersedes state law, the McCarran–Ferguson Act’s provision that “no Act of Congress” shall be construed to supersede state law regulating the business of insurance is inapplicable.

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## V

There is precedent that at the time of the McCarran–Ferguson Act’s enactment, courts analyzed treaties, even when implemented by an Act of Congress, as treaties. The Supreme Court’s decision in *Missouri v. Holland* reflects that a treaty followed by implementing legislation remains a treaty that,

where relevant, is viewed as distinct from an Act of Congress. . . . The Supreme Court decided *Holland* in 1920, so when Congress passed the McCarran–Ferguson Act two decades later (and the Convention Act half a century later), it was well aware that a treaty, even if requiring implementation, was distinct from an Act of Congress and could serve as the source of authority to “override [a state’s] power.”

We think it unlikely that when Congress crafted the McCarran–Ferguson Act, it intended any future treaty implemented by an Act of Congress to be abrogated to the extent that the treaty conflicted in some way with a state law regulating the business of insurance if Congress’s implementing legislation did not expressly save the treaty from reverse-preemption by state law. If this had been Congress’s intent, it seems probable that Congress would have included a term such as “or any treaty requiring congressional implementation” following “Act of Congress” and “such Act” in the McCarran–Ferguson Act. There is no indication in the McCarran–Ferguson Act that Congress intended, through the preemption provision and the use of the term “Act of Congress,” to restrict the United States’ ability to negotiate and implement fully a treaty that, through its application to a broad range of international agreements, affects some aspect of international insurance agreements.

#### **b. Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int’l, Ltd.**

On February 13, 2009, the U.S. Court of Appeals for the Sixth Circuit affirmed a district court’s order compelling arbitration and refusing to issue a foreign antisuit injunction. *Answers in Genesis of Kentucky v. Creation Ministries Int’l, Ltd.*, 556 F.3d 459 (6th Cir. 2009). As the Sixth Circuit explained, the case arose from a dispute between Answers in Genesis of Kentucky (“AiG”), a Kentucky-based nonprofit, and Creation Ministries International (“CMI”), an Australian nonprofit. On October 13, 2005, the two organizations concluded a Memorandum of Agreement (“MOA”), which included an arbitration clause, and a Deed of Copyright License. After AiG rejected CMI’s subsequent attempt to nullify the two agreements, CMI filed suit against AiG and its leader in Australian court. AiG subsequently filed a motion in federal court in Kentucky to compel arbitration and to enjoin the Australian suit. AiG and CMI then agreed to stay the Australian litigation until the U.S. suit was resolved.

The Sixth Circuit upheld all aspects of the district court’s judgment. First, as to CMI’s claim that Australia was the only permissible forum for the parties to resolve disputes arising from the agreements, the Sixth Circuit held that “the plain language of the contractual provisions at issue provides that Australia is only one possible forum for any potential litigation” and thus “[t]he district court did not err in refusing to dismiss AiG’s motion to compel arbitration based upon the contract’s forum selection clause.” *Id.* at 465, 466. Second, as to CMI’s claim that the district court should have abstained out of deference to the Australian litigation, the court held that “neither international comity nor the traditional abstention factors applicable to parallel proceedings require abstention.” *Id.* at 469. In its analysis of the issue of international comity, the court looked to international law, stating:

International law, as incorporated by congressional action, supports our conclusion that abstention is inappropriate in this case. A similar concern for enforcing private agreements led to the adoption of the international treaty under which AiG seeks to vindicate its right to arbitrate. AiG filed this action under § 206 of the FAA [Federal Arbitration Act]. 9 U.S.C. § 206. Section 206 provides that district courts may compel arbitration upon motion of a party to an agreement covered by the 1958 Convention on the Recognition and Enforcement of Arbitral Awards (“Convention”). Chapter Two of the FAA incorporates the provisions of the Convention into American domestic law. See 9 U.S.C. §§ 201–208. Both Australia and the United States are signatories to the Convention, and thus its terms govern the resolution of this dispute. . . . Article II of the Convention, as incorporated by the FAA, establishes the requirements necessary for an arbitration agreement to come within the Convention’s terms. The agreement must be in writing, concern a “legal relationship . . . which is considered as commercial,” and either at least one party to the contract must not be an American citizen or the commercial relationship must have a “reasonable relation with one or more foreign states.” 9 U.S.C. § 202. *Cf.* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. [hereinafter Convention] . . . All of the Convention’s requirements are therefore met. Consequently, “when one of the parties” to the arbitration agreement requests a court refer the dispute to arbitration, that court “shall” do so. Convention art. II(3). *Cf.* 9 U.S.C. § 208.

As other courts construing the Convention’s language have observed, “there is nothing discretionary about Article II(3) of the Convention.” *Tennessee Imports, Inc. v. Filippi*, 745 F. Supp. 1314, 1322 (M.D. Tenn. 1990) (quoting *McCreary Tire & Rubber Co. v. CEAT S.P.A.*, 501 F.2d 1032, 1037 (3d Cir. 1974)). The language of the treaty and its statutory incorporation provide for no exceptions. When any party seeks arbitration, if the agreement falls within the Convention, we must compel the arbitration unless the agreement is “null and void, inoperative, or incapable of being performed.” Convention art. II(3). . . . Further, it is difficult to see how comity concerns could come into play where both Australia and the United States, as signatories to the Convention, apply the same law. . . . To assume that

the district court's order infringes on comity concerns is to assume that Australian courts would not follow their obligation under the Convention, as CMI's argument must rest upon an assumption that an Australian court would be less likely to order arbitration. Such an argument both demeans the foreign tribunal and hardly advances the comity interests that CMI claims to seek to vindicate. . . .

*Id.* at 468–69.

Third, based on its analysis of the plain language of the arbitration clause in the MOA, the court upheld the district court's decision to refer all aspects of the parties' dispute to arbitration. *Id.* at 470. Last, the court held that the district court's decision not to issue a foreign antisuit injunction concerning the Australian litigation was not an abuse of its discretion since the Australian proceedings remained suspended. *Id.* at 471–72.

#### **4. *Forum Non Conveniens***

##### **a. *Montreal Convention: Pierre–Louis v. Newvac Corp.***

On October 8, 2009, the U.S. Court of Appeals for the Eleventh Circuit affirmed a district court's dismissal of litigation brought by the family members of 160 passengers and crew members who were killed when West Caribbean Airways flight 708 crashed in Venezuela en route from Panama. *Pierre–Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009). In so holding, the court concluded that *forum non conveniens* applies in cases involving claims brought under the Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal, May 28, 1999 ("Montreal Convention"). The court also concluded that the district court had not abused its discretion in dismissing the case on *forum non conveniens* grounds. The court considered, among other things, the plaintiffs' argument that their choice of forum "is entitled to heightened deference because their access to U.S. courts is granted by an international treaty with a specific venue provision," concluding that, "[r]egardless of the merits of Plaintiffs' argument on this point . . . , the analysis cannot end with a presumption of convenience, but must address the actual convenience of the various available fora." *Id.* at 1059. See *Digest 2008* at 513–19 for discussion of the *amicus curiae* brief the United States filed on May 14, 2008, expressing the view that U.S. courts may apply the *forum non conveniens* doctrine to claims brought under Article 33 of the Montreal Convention. The U.S. brief is available as document 53 for *Digest 2008* at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). Excerpts follow from the court's

analysis of the applicability of *forum non conveniens* in cases brought under the Montreal Convention (footnotes omitted).\*

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## I.

The doctrine of *forum non conveniens* permits a court with venue to decline to exercise its jurisdiction when the parties' and court's own convenience, as well as the relevant public and private interests, indicate that the action should be tried in a different forum. A defendant seeking dismissal for *forum non conveniens* bears the burden of demonstrating:

(i) that an adequate alternative forum is available, (ii) that relevant public and private interests weigh in favor of dismissal, and (iii) that the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice. Pertinent private interests of the litigants include relative ease of access to evidence in the competing fora, availability of witnesses and compulsory process over them, the cost of obtaining evidence, and the enforceability of a judgment. Relevant public interests include the familiarity of the court(s) with the governing law, the interest of any foreign nation in having the dispute litigated in its own courts, and the value of having local controversies litigated locally.

*Liquidation Comm'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1356–57 (11th Cir. 2008) (quotations and citations omitted).

. . . Chapter III of the Convention is entitled "Liability of the Carrier and Extent of Compensation for Damage." Article 33, located in Chapter III, is the jurisdictional provision which specifies in which fora such suits can be brought:

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air. . . .

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\* Editor's note: On June 7, 2010, the U.S. Supreme Court denied certiorari. *Bapte v. West Caribbean Airways*, 130 S. Ct. 3387 (2010).

Thus, under Article 33 of the Convention, suits for damages by passengers on international flights can be filed in a limited number of fora, including, *inter alia*, the domicile of the “carrier” or the principal place of business of the “carrier.” In the case of damage resulting from the injury or death of a passenger, suit may be brought in the passenger’s permanent residence if the “carrier” operates air carriage services to or from that location.

The term “carrier” is undefined in the Convention. However, Chapter V of the Convention, entitled “Carriage by Air Performed by a Person other than the Contracting Carrier,” addresses situations in which there is both a “contracting carrier” and an “actual carrier.” Article 39, located in Chapter V of the Convention, provides the definitions for “contracting carrier” and “actual carrier”:

The provisions of [Chapter V] apply when a person (hereinafter referred to as “the contracting carrier”) as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as “the actual carrier”) performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

These definitions are significant because Article 40, in Chapter V, provides that “[i]f an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in [Chapter V], be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.”

In turn, Article 45 provides that a plaintiff may bring an action for damages under the Convention against the actual carrier or the contracting carrier, or against both together or separately, and Article 46 specifies the fora in which a plaintiff may bring such a suit. Article 46 provides that “[a]ny action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.” . . .

\* \* \* \*

When interpreting a treaty, we begin with the words of the treaty in the context in which the words are used. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988). Plaintiffs concede that the starting point of treaty interpretation is the relevant text and recognize that the treaty expressly provides that “[q]uestions of procedure” are governed by the law of the forum in which the case is validly brought. They argue, however, that because the Convention does not specifically affirm the availability of forum non conveniens, it should not be permitted in cases arising under it. We find this argument untenable for two reasons. First, there is no dispute that forum non conveniens is a “question[] of procedure” under U.S. law and thus it clearly falls within the ambit of Article 33(4). Second, under Plaintiffs’ theory, all state procedural rules would have to be specifically enumerated in order to be applicable under the Convention, and we do not believe the Convention’s drafters intended such an absurd result.

Plaintiffs further argue that to permit the application of forum non conveniens would undermine the purpose and implementation of the Convention’s jurisdictional provisions, which have

already enumerated the five “convenient” jurisdictions for purposes of adjudicating international carrier liability. Although we acknowledge Plaintiffs’ concerns, we think the purpose of the Convention is adequately safeguarded under traditional *forum non conveniens* analysis. As the district court pointed out, *forum non conveniens* would permit dismissal under the Convention only if the alternative forum was authorized to hear the case under Article 33(1) or (2) and was “demonstrably the more appropriate venue.”

We therefore find no ambiguity or limitation in the express language of Article 33(4), which states in no uncertain terms that questions of procedure—which can only reasonably be read to include *all* questions of procedure—are governed by the rules of the forum state. As the district court correctly noted, the doctrine of *forum non conveniens* is “firmly entrenched in the procedural law of the United States.” In addition, we are satisfied that a district court may—where appropriate—exercise its discretion to apply *forum non conveniens*, without interfering with the implementation of the Convention, so long as another Convention jurisdiction is available and can more conveniently adjudicate the claim.

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#### **b. Vivendi SA v. T-Mobile USA, Inc.**

On November 2, 2009, the U.S. Court of Appeals for the Ninth Circuit affirmed a lower court’s decision dismissing a complaint on the basis of *forum non conveniens*. *Vivendi SA v. T-Mobile USA, Inc.*, 586 F.3d 689 (9th Cir. 2009). In this case, a French company, Vivendi S.A., and a Delaware company, Vivendi Holding I Corp. (collectively “Vivendi”), brought claims against Deutsche Telekom AG, T-Mobile International AG, and T-Mobile Deutschland GmbH, all German corporations; T-Mobile USA, Inc., a Delaware corporation with its main operations in Washington State; and a Polish national. The litigation arose from Vivendi’s efforts to recoup its investment in a Polish telecommunications company in which T-Mobile Deutschland GmbH also invested. In affirming the district court’s decision, the Ninth Circuit concluded that the court had not abused its discretion, noting that “[t]he decision as to whether a forum is ‘convenient’ for litigation and, perhaps, trial is fundamentally a factual determination by the district court. In this case, all of the conduct underlying Vivendi’s claims occurred overseas, and all of the witnesses but three reside in Europe.” *Id.* at 696.



## 5. Judicial Assistance

### *a. Discovery in the United States for use in a foreign arbitration*

In an unpublished opinion issued on August 6, 2009, the U.S. Court of Appeals for the Fifth Circuit upheld a lower court's denial of a request for discovery in the United States that an El Salvadoran company, CEL, sought for use in an international arbitration in Switzerland. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. Appx. 31 (5th Cir. 2009); 2009 U.S. App. LEXIS 17596 (5th Cir. 2009). CEL brought its request based on 28 U.S.C. § 1782, which provides federal court assistance in gathering evidence for use in foreign tribunals. Paragraph (a) of the statute, in particular, provides that a district court "may order" a person residing or found in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal . . . upon application of any interested person."

At the same time CEL filed its request in the U.S. District Court for the Southern District of Texas and another one in the District of Delaware, the Swiss arbitral tribunal issued a limited discovery order. While CEL's appeal was pending, the arbitral tribunal closed its hearing of the evidence in the arbitration, and the U.S. corporation from which CEL was seeking discovery sought dismissal of the appeal on the ground that it was moot. The court concluded that the appeal was not moot because, under the UNCITRAL arbitration rules, "an 'arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.' If CEL discovers new evidence from its § 1782 application, it may ask the arbitral tribunal to reopen the evidentiary hearing to consider the evidence." *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. Appx. at 33; 2009 U.S. App. LEXIS 17596, at \*5-6 (footnote omitted).

On the merits, the court concluded that the Supreme Court's 2004 decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248 (2004), did not overrule the applicable Fifth Circuit precedent, *Republic of Kazakhstan v. Biedermann Int'l*, which held that "a 'tribunal' within the meaning of § 1782 did not include a private international arbitral tribunal, and thus § 1782 did not apply to discovery sought for use in such a tribunal." *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. Appx. at 33; 2009 U.S. App. LEXIS 17596, at \*7 (citing *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999)). Therefore, the Ninth Circuit concluded that the district court did not abuse its discretion in relying on *Biedermann* to deny discovery. For additional discussion of the Supreme Court's decision in *Intel Corp.*, see *Digest 2004* at 851-56.

## ***b. Service of process in a foreign country: Hague Service Convention***

On March 23, 2009, the Federal Trade Commission (“FTC”) filed a brief addressing the requirements for service of process in Belize. *Federal Trade Comm’n v. Innovative Mktg., Inc.*, No. RDB-08-CV-3233 (D. Md. 2009). The defendants had filed a motion to dismiss an FTC complaint against them on the grounds that the FTC’s use of a private law firm in Belize to serve their co-defendant was invalid. As the FTC explained in its motion for leave to file its brief, “[t]he FTC . . . consulted with the State Department, which . . . searched its records and provided the FTC with guidance on service of process in Belize. This guidance directly contradicts the defendants’ argument.”

Excerpts below from the brief provide additional background on the facts of the litigation and set forth the requirements for service of process in Belize under the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (“Hague Service Convention”) (footnotes omitted). The full text of the FTC brief, the accompanying declarations of Avril Haines, Assistant Legal Adviser for Treaty Affairs, Department of State, and Edward A. Betancourt, Director, Office of Policy Review and Inter-Agency Liaison, Directorate of Overseas Citizens Services, Department of State Bureau of Consular Affairs, and other accompanying submissions, are available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm). On June 10, 2009, the U.S. District Court for Maryland issued an order denying the defendants’ motion to dismiss.

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### **A. The Commission Has Properly Served IMI [Innovative Marketing, Inc.]**

Defendants contend that the FTC’s use of a private law firm in Belize to personally serve IMI’s registered agent in that country is not valid because Belize and the United States are parties to an agreement that requires all service of process in Belize to be sent exclusively to Belize’s central authority. The sole authority cited by the defendants for the existence of this purported agreement is a single sentence from a now defunct State Department webpage. This sentence indicated that “authorities” from the government of Belize have advised the “US Embassy” that the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (the “Hague Service Convention”) applies in Belize and that “requests for service should be sent to the following central authority.” From this sentence, the defendants leap to the conclusion that service via the central authority in Belize is the *only* acceptable means of service in Belize.

The defendants’ decision to base their argument entirely on a single sentence on a now defunct State Department webpage is curious given that, even when the page was active, it contained an explicit disclaimer cautioning readers that the information provided “may not be totally accurate” and should be used for “general information only.” See

[http://web.archive.org/web/20080212013227/http://travel.state.gov/law/info/judicial/judicial\\_686.html](http://web.archive.org/web/20080212013227/http://travel.state.gov/law/info/judicial/judicial_686.html) (an archived version of the now defunct webpage cited by defendants). Had the defendants taken the next step, and actually consulted the State Department, they would have learned that their conclusions about the laws of service in Belize are mistaken, and that the FTC’s use of a private process server constitutes valid service on IMI.

## 1. The Hague Service Convention Applies Between the United States and Belize As It Did in 1981

... [T]he FTC consulted the State Department's Office of Treaty Affairs for its official position on Belize's status under the Hague Service Convention. In response to the FTC's request, the State Department reviewed its treaty file for Belize and determined that on September 29, 1982, newly independent Belize contacted the Secretary General of the United Nations and informed the U.N. that "the Government of Belize has decided to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom of Great Britain and Northern Ireland was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize." ... [Ms. Haines's declaration confirms that] it is the view of the State Department that the Hague Service Convention applies between the United States and Belize "as it applied between British Honduras and the United States prior to Belize's independence in 1981." See Haines Decl. at ¶ 5.

## 2. Under the Applicable Provisions of the Hague Service Convention, the FTC's Service Upon IMI Was Proper

In light of the State Department's conclusion, the sole question for this Court is whether service by private process server was a valid means of service under the Hague Service Convention as the Convention applied in British Honduras (now Belize) prior to Belize's independence. ... [T]he answer to this question is unambiguously yes.

In order to reach this conclusion, the FTC first confirmed that the Hague Service Convention applied in Belize before its independence. This fact is confirmed by the Hague Conference on Private International Law—the inter-governmental organization responsible for implementation and operation of the Hague Service Convention—which notes that the Convention entered into force in the United Kingdom in 1969 and was extended to its dependency British Honduras (now Belize) in 1970. See "Entry Into Force", available online at [http://www.hch.net/index\\_en.php?act=status.comment@csid=902&disp=eif](http://www.hch.net/index_en.php?act=status.comment@csid=902&disp=eif).

Next, the FTC confirmed that service of process by private process server is permissible in the United Kingdom, and by extension Belize, under the Hague Service Convention as the Convention was adopted by the United Kingdom. Under Article 10 of the Convention, service of process is permitted using a variety of means, including private process server, provided that the country adopting the Convention does not object to such alternative means. In its initial declaration concerning methods of service under Article 10, the United Kingdom stated that documents would be accepted "only by the central or additional authorities and only from judicial consular or diplomatic officers of other Contracting States." See "Declarations," available online at [http://www.hcch.net/index\\_en.php?act=status.comment&csid=427&disp=resdn](http://www.hcch.net/index_en.php?act=status.comment&csid=427&disp=resdn). The U.K. later clarified this position in a 1980 letter to the Permanent Bureau of the Hague Conference on Private International Law, noting that "our declaration does not preclude any person in another Contracting State who is interested in a judicial proceeding (including his lawyer) from effecting service in the United Kingdom 'directly' through a competent person other than a judicial officer or official, e.g., a solicitor (. . . )." *Id.* As a result of the 1980 clarification, "direct" service of process via private process server has long been recognized as a valid means of service in the United Kingdom, and by extension, in Belize. *Cf. Koehler v. Dodwell*, 152 F.3d 304, 307–08 (4th Cir. 1998) (holding that service by private process server is valid in the Bahamas, based on the United Kingdom's adoption of the Hague Convention on behalf of the Bahamas). See also "Special Consular Services," available online at [http://london.usembassy.gov/cons\\_new/acs/scs?serving\\_legal\\_papers\\_and\\_process.html](http://london.usembassy.gov/cons_new/acs/scs?serving_legal_papers_and_process.html) (confirming,

on the official website of the U.S. Embassy for the United Kingdom, that service of process in the U.S. may be effected through private process server and providing a list of process servers available for hire).

Thus, under the Hague Service Convention as it applies between the United States and Belize, service of process via private process server is a valid means of service in Belize. As a result, the Commission's use of a private process server to serve IMI constitutes valid service, and the defendants' motion to dismiss must fail.

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### ***c. Assistance to foreign tribunals: Letters rogatory***

On December 3, 2009, the United States filed a response in the U.S. Court of Appeals for the Tenth Circuit, opposing a motion for an injunction pending appeal in a case arising out of a letter rogatory the Republic of Chile issued pursuant to the Inter-American Convention on Letters Rogatory. *Malone v. Holder*, No. 09-1442 (10th Cir.). The plaintiff-appellant sought to enjoin the U.S. Department of Justice from executing the letter rogatory, by which Chile sought U.S. assistance in serving a Chilean antitrust complaint and other legal documents against the plaintiff-appellant in Colorado. The U.S. District Court for the District of Colorado denied the plaintiff's motion for an injunction on the merits in an unpublished order issued on September 28, 2009, and it denied the plaintiff's motion for an injunction pending appeal on November 19, 2009. *Malone v. Holder*, 2009 U.S. Dist. LEXIS 116771 (D. Colo. 2009).

The United States argued that the court should not grant the plaintiff-appellant an injunction because he had failed to establish "that the probability of success on the merits, balance of harms, and public interest warrant an injunction." [fn. omitted] The government argued first that the plaintiff had no cause of action and thus "cannot demonstrate a substantial probability of success on the merits." As to the balance of harms and public interest, the government argued that both factors "weigh decidedly against an injunction pending appeal." The government stated:

The only "harm" that will befall Malone if service is perfected during the pendency of this appeal is that he will be subject to the jurisdiction of the Chilean antitrust tribunal and compelled to defend himself there. Such litigation expense is not cognizable harm in the first instance. *FTC v. Standard Oil of California*, 449 U.S. 232, 244 (1980). And though Malone asserts that an injunction is necessary to prevent the case from becoming moot, such extraordinary relief is not warranted where the challenged agency action is not subject to judicial review in the first instance and where, as the district court found, the appeal would not in fact be mooted if service is perfected.

Finally, an injunction would impair the United States' substantial interest in obtaining reciprocal cooperation from other countries in promptly serving process issued by United States courts. The public interest therefore weighs heavily against an injunction. Malone's request for an injunction pending appeal should therefore be denied.

Further excerpts from the U.S. brief follow, discussing the Inter-American Convention on Letters Rogatory ("IAC") and the government's argument that, because the "determination of whether to assist a foreign government in serving process on individuals within the United States is committed by law to the discretion of the Department of Justice," the plaintiff lacked a cause of action and "cannot demonstrate a substantial probability of success on the merits." (Footnotes and citations to the Administrative Record are omitted.) The full text of the U.S. brief and the district court's unpublished order and judgment of September 28 are available at [www.state.gov/s/l/c8183.htm](http://www.state.gov/s/l/c8183.htm).

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The Inter-American Convention on Letters Rogatory ("IAC"), *reprinted at* 28 U.S.C. 1781, is a treaty that establishes a mechanism for State parties to obtain the cooperation of another State party in serving legal process, summonses, or subpoenas. It applies to process issued "in conjunction with civil or commercial matters held before the appropriate judicial or other adjudicatory authority." IAC, art. 2. State parties may, at their option, declare that the IAC also applies to process issued in criminal, labor, arbitration, and "contentious-administrative" cases. *Id.*, art. 16.

To request service of process in matters covered by the IAC, the requesting or "sending" State must issue a duly-authorized letter rogatory requesting the destination State's assistance in serving process on a person within the destination state. *Id.*, arts. 5–7. The letter rogatory must be accompanied by an authenticated copy of the complaint or other pertinent legal process, along with written information on the judicial or other adjudicatory body presiding over the proceeding, the time limits on a response, and a warning of the consequences of failing to respond. *Id.*, art. 8.

Each State party to the IAC designates a "Central Authority" to receive and distribute letters rogatory. *Id.*, art. 4 & Additional Protocol, art.4. In the United States, the designated Central Authority is the Department of Justice. Exec. Order No. 12,638, 53 Fed. Reg. 15,649 (Apr. 28, 1988).

Under the IAC, a letter rogatory is to be executed in accordance with the laws and procedural rules of the destination State. *Id.*, art. 10. The IAC further provides that the treaty does not limit other means of executing a letter rogatory, thus stating that the treaty "shall not limit any provisions regarding letters rogatory" in bilateral or multilateral agreements, nor "preclude the continuation of more favorable practices in this regard that may be followed by" State parties. *Id.*, art. 15.

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I. Plaintiff Has No Cause of Action Under The APA And Thus Cannot Demonstrate A Substantial Probability of Success On The Merits.

Plaintiff's principal contention is that Chile's invocation of the IAC treaty imposes affirmative limitations on the Executive Branch's authority to assist a signatory foreign state in serving process within the United States, and that these putative limitations are enforceable by private individuals through an action commenced under the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq.* The decision as to whether to assist the Chilean government in the service of its process, however, is committed to agency discretion by law. Plaintiff therefore has no cause of action under the APA or any other source of law.

The APA is a limited waiver of the government's sovereign immunity from suit. It provides that "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA withdraws that waiver of sovereign immunity, however, when the relevant statute "precludes judicial review," 5 U.S.C. § 701(a)(1), or when the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). *See generally High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1181 (10th Cir. 2006).

The latter exception to APA review provides that, even where Congress has not affirmatively precluded review, review is not to be had if the law in question is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. The pertinent law is deemed to have "committed" the decisionmaking to the agency's judgment absolutely, and to thus bar judicial review under the APA. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

The Department of Justice's determination to assist Chile in the service of process on plaintiff Malone falls squarely within this exception to APA review. The Supreme Court has long held that "the very nature of executive decisions as to foreign policy is political, not judicial," because "[s]uch decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Thus, as a general matter, the conduct of foreign relations involves the kind of judgment that is typically committed to the discretion of the Executive Branch. *See, e.g., Saavedra Bruno v. Albright*, 197 F.3d 1153 (D.C. Cir. 1999) (consular visa decisions committed to State Department discretion by law and not subject to APA review). Though it is "error to suppose that every case or controversy which touches foreign relations is beyond judicial cognizance," judicial review of such matters is not permitted unless there is a treaty, statute, or other binding legal authority that establishes judicially manageable and privately enforceable standards constraining the Executive Branch's discretion. *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 229–30 (1986), quoting *Baker v. Carr*, 369 U.S. 186, 211 (1969).

No such provisions constrain the Executive Branch's authority here. As an initial matter, the IAC treaty does not purport to set forth the sole and exclusive circumstances in which a participating state may assist another state in the service of process and thus does not, without more, impose judicially enforceable limitations on the government's discretion. The treaty instead explicitly provides that it "shall not limit any provisions regarding letters rogatory" in bilateral or multilateral agreements, nor "preclude the continuation of more favorable practices in this regard that may be followed by" State parties. IAC, art. 15. The Fifth Circuit has accordingly held that the IAC does not supplant other means of serving process but rather permits signatories to continue, at their option, any other, otherwise lawful means of service. *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634 (5th Cir. 1994); *accord Pizzabiochhe v. Vinelli*, 772 F. Supp. 1245, 1249 (M.D. Fla. 1991).

Malone has conceded that the IAC does not, of its own force, bar service of process issued by a

Chilean antitrust tribunal pursuant to other legal authority. . . . He asserts, however, that Chile's request for assistance limits the Department of Justice's discretion by authorizing only such service as is expressly provided for in the treaty itself. Malone notes in particular that the letter from the Embassy of Chile requesting service of process requests that the letter rogatory be processed pursuant to the IAC.

The document on which Malone chiefly relies is a one-page letter addressed, not to the United States government, but to the Department of Justice's private, process serving agent, Process Forwarding International. Malone's assertion that the Embassy of Chile can unilaterally impose binding legal constraints on the Executive Branch's discretionary authority by transmitting a letter to a private process serving agent strains credulity. Article 15 of the IAC expressly reserves to the United States authority to serve process in circumstances not otherwise covered by the treaty itself. A foreign government cannot limit that reservation of authority by a unilateral decree of any sort, let alone by means of a brief transmittal letter addressed to a private process server.

In any event, the record does not indicate any intent on the part of the Chilean government to limit service [of] process to those means or circumstances authorized by the IAC. The embassy letter on which Malone chiefly relies states only that "[t]he Embassy of Chile would appreciate if PFI would process the attached Letter Rogatory according to the Inter[-]American Convention on Letter[s] Rogatory \* \* \* ." This is nothing more than a request for the assistance contemplated by the IAC. That the Embassy of Chile would "appreciate" processing under the IAC in no way suggests that it is disinclined to accept—and intends to prohibit—service of process pursuant to other legal authority.

Moreover, the Chilean judicial determinations resulting in the issuance of an international letter rogatory reflect a clear intent to authorize service of process in the United States pursuant to any lawful authority, not merely the authority conferred by the IAC. The Chilean antitrust court thus called for the issuance of a letter rogatory empowering the pertinent United States authority to "have broad powers to take all such steps as are necessary for the processing of the letter rogatory and service upon the defendant according to the laws prevailing within the defendant's place of residence." Similarly, the Chilean Supreme Court approved a letter rogatory authorizing service to be made on Malone, not merely in accordance with the IAC, but rather "in accordance with the law of the State of destination." These Chilean judicial determinations thus make clear that Chile intended that the United States use *any* lawful means of perfecting service, regardless of whether service was authorized by the IAC or some other legal authority.

Finally, even if authority to serve process were limited to that set forth in the IAC—a point we vigorously dispute—the Chilean antitrust proceeding is a "civil or commercial" matter covered by the IAC. *Cf. Restatement (Third) of Foreign Relations*, 471, cmt. f (noting that United States treats most non-criminal proceedings as "civil or commercial" matters covered by the Hague Service Convention). Plaintiff thus errs in asserting that the IAC does not authorize service of process here.

In sum, neither the IAC nor any other law constrains the Department of Justice's discretion to assist Chile in the service of process on Malone. The matter is committed to the Department's discretion by law and therefore is not subject to judicial review under the APA. Malone has no cause of action to challenge the service of process upon him, and he consequently cannot demonstrate the substantial probability of success on the merits necessary to obtain an injunction.

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## **Cross References**

*International adoption and child abduction*, **Chapter 2.B.**

*Consideration of treaty provisions in assessing applicability of forum non  
conveniens and international comity in litigation*, **Chapter 4.C.1.**

*Foreign Sovereign Immunities Act*, **Chapter 10.A.1.**

*Aviation law*, **Chapter 11.A.1.**